

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 35025

STATE OF IDAHO,	)	2009 Unpublished Opinion No. 491
	)	
Plaintiff-Respondent,	)	Filed: June 8, 2009
	)	
v.	)	Stephen W. Kenyon, Clerk
	)	
SCOTTY ZEE POND,	)	THIS IS AN UNPUBLISHED
	)	OPINION AND SHALL NOT
Defendant-Appellant.	)	BE CITED AS AUTHORITY
	)	

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Appeal from the District Court of the Fourth Judicial District, State of Idaho, Ada County. Hon. Darla S. Williamson, District Judge.

Order of the district court denying ICR 35 motion, affirmed.

Molly J. Huskey, State Appellate Public Defender; Diane M. Walker, Deputy Appellate Public Defender, Boise, for appellant.

Hon. Lawrence G. Wasden, Attorney General; Lori A. Fleming, Deputy Attorney General, Boise, for respondent.

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GRATTON, Judge

Scotty Zee Pond appeals from the district court's order denying his Idaho Criminal Rule 35 motion. Pond contends that the district court imposed his sentence in an illegal manner when it denied him his right to allocution. We affirm.

I.

FACTS AND PROCEDURAL BACKGROUND

The State charged Pond with felony domestic violence, Idaho Code §§ 18-918, 918(2). Pursuant to a plea agreement, Pond entered an *Alford*<sup>1</sup> plea, which the district court accepted. A sentencing hearing was held but was continued to allow the court time to review an issue raised by Pond regarding information in the presentence report. The district court ultimately imposed a unified sentence of seven years with five years determinate, and the court retained jurisdiction.

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<sup>1</sup> *North Carolina v. Alford*, 400 U.S. 25 (1970).

Almost four months later, on September 27, 2007, the court relinquished jurisdiction. Pond did not appeal his conviction and sentence or the order relinquishing jurisdiction.

Pond filed a Rule 35 motion on January 2, 2008, wherein he requested reconsideration of his sentence on grounds of leniency and requested leave to supplement his motion with supporting documentation after February 1, 2008. Pond filed several “addendums” to his Rule 35 motion, consisting of letters written by Pond to the district court and to his attorney, letters written on Pond’s behalf, and other documentation mostly relating to Pond’s rehabilitative efforts in prison. Attached to his final addendum (“6th Addendum to Defendant’s Motion Pursuant to ICR 35”), filed February 11, 2008, was a letter from Pond to his attorney, wherein, among other things, he cited cases regarding the right to allocution prior to a court imposing a sentence. The district court entered an order on February 14, 2008, denying Pond’s Rule 35 motion. This appeal followed.

## II.

### ANALYSIS

Pond argues that, because the district court did not afford Pond his right to allocution before pronouncing sentence, the sentence was imposed in an illegal manner and Pond’s Rule 35 motion was inappropriately denied. The State argues that the question of imposition of sentence in an illegal manner was not addressed below and, even if the issue was raised it was untimely.

A motion for reduction of sentence under I.C.R. 35 is essentially a plea for leniency, addressed to the sound discretion of the court. *State v. Knighton*, 143 Idaho 318, 319, 144 P.3d 23, 24 (2006); *State v. Allbee*, 115 Idaho 845, 846, 771 P.2d 66, 67 (Ct. App. 1989). In presenting a Rule 35 motion, the defendant must show that the sentence is excessive in light of new or additional information subsequently provided to the district court in support of the motion. *State v. Huffman*, 144 Idaho 201, 203, 159 P.3d 838, 840 (2007). In conducting our review of the grant or denial of a Rule 35 motion, we consider the entire record and apply the same criteria used for determining the reasonableness of the original sentence. *State v. Forde*, 113 Idaho 21, 22, 740 P.2d 63, 64 (Ct. App. 1997); *State v. Lopez*, 106 Idaho 447, 449-51, 680 P.2d 869, 871-73 (Ct. App. 1984). In an appeal from the denial of a motion under Rule 35 to correct a sentence imposed in an illegal manner, the question of whether the sentence was imposed in an illegal manner is a question of law freely reviewable by the appellate court. *State v. Farwell*, 144 Idaho 732, 735, 170 P.3d 397, 400 (2007).

The issue which Pond advances on this appeal was not raised below. Pond's Rule 35 motion requested "reconsideration of sentence upon the grounds and for the reason that the defendant requests leniency." Pond's motion also asks leave to supplement the motion with supporting documentation. Thereafter, Pond filed six "addendums" to the motion. In each such addendum, Pond stated that he was submitting the attached documentation in support of the "defendant's previously filed ICR 35 motion for the Court's consideration." Attached to each of the addenda were documents consisting of letters written by Pond to the district court and to his attorney, letters written on Pond's behalf, and other documentation mostly relating to Pond's rehabilitative efforts in prison.

Attached to Pond's sixth and final addendum was a letter to his lawyer within which Pond cited to certain case law involving the right of allocution. In the letter Pond stated, "The case law I'm giving you includes stuff about allocution. This specifically is what I'd like to retain, if need be, for a post conviction relief." Thereafter, Pond listed several cases discussing the right to allocution. Pond never indicated that the Rule 35 motion was based on the imposition of sentence in an illegal manner or any basis other than leniency. Nor did he ask for any relief other than leniency. *See* I.C.R. 47 (a motion filed in a criminal matter "shall state the grounds upon which the motion is made and shall set forth the relief or order sought"). No argument was ever presented to the district court regarding a claim that the court's failure to afford Pond his right to allocution rendered his sentence imposed in an illegal manner. While the district court that ruled on the Rule 35 motion had sentenced Pond months earlier, nothing regarding the facts as to what occurred at the earlier sentencing was before the court at the time of deciding the Rule 35 motion. Pond submitted no affidavit as to what transpired at sentencing. The transcripts of the sentencing hearings were not even prepared until after the district court decided the Rule 35 motion. The court did not address or rule upon the issue. The district court's denial of Pond's motion makes clear that it was only ruling with respect to the issue of leniency, the sole ground for relief stated in the motion. Thus, it is clear that the district court did not consider that a motion regarding allocution was even before the court for its determination. Because the issue of the imposition of sentence in an illegal manner was not raised before the district court, we will not consider the issue on appeal. Generally, issues not raised below may not be considered for the first time on appeal. *State v. Fodge*, 121 Idaho 192, 195, 824 P.2d 123, 126 (1992).

**III.**  
**CONCLUSION**

As Pond did not raise the right to allocution before the district court, we will not consider the merits of his claim. The district court's order denying Pond's Rule 35 motion is, therefore, affirmed.

Chief Judge LANSING and Judge PERRY, **CONCUR.**